In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-35

WALTER LEE HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on two counts charging possession and passing of counterfeit Federal Reserve notes in violation of 18 U.S.C. 472 and 473. He was sentenced to concurrent five year terms of imprisonment. The court of appeals affirmed (Pet. App. A).

Petitioner does not challenge the sufficiency of the government's evidence (summarized at Pet. 8-14) to support his conviction. He claims here, as he did in

the court below, that the trial judge erred in permitting the government to show a prior conviction, after he had testified in his own behalf (see Tr. 173-174), and in instructing the jury that all witnesses are presumed to speak the truth (see Tr. 222). Petitioner placed his credibility in issue when he took the stand. Because of this, the trial court could properly admit evidence of the prior conviction.[1] See *Spencer* v. *Texas*, 385 U.S. 554, 561; *Nutter* v. *United States*, 412 F. 2d 178, 182 (C.A. 9), certiorari denied, 397 U.S. 927. At trial, petitioner's counsel objected to this evidence solely on the ground that it was outside the scope of direct or cross examination. As the court below concluded, this was not enough to require exclusion of the evidence. See *United States* v. *Allison*, 414 F. 2d 407, 411-412 (C.A. 9), certiorari denied, 396 U.S. 968.

Nor is there merit to petitioner's contention that the instruction that a witness is presumed to speak truthfully denied him a fair trial. The instruction went on to say that the presumption could be overcome by various facts (Tr. 222). Petitioner did not object to this instruction at trial. The judge also gave full instructions on the factors to be considered in judging the credibility of witnesses (Tr. 223) and told the jury that testimony of an accomplice should be viewed

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[1] Nor, in the circumstances here, does this decision conflict with the rule applicable in the District of Columbia Circuit (see *Luck* v. *United States*, 348 F. 2d 763 (C.A. D.C.)), as petitioner suggests (Pet. 22-25). Under the *Luck* rule, admission of evidence concerning the prior conviction is discretionary with the trial judge, and petitioner has shown no abuse of discretion in this ca

with care (Tr. 227-228). The charge as a whole set the issues in proper framework, and accordingly the court below correctly rejected petitioner's claim of plain error.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

[2] The cases on which petitioner relies are readily distinguishable on the ground that defense counsel objected to the instruction at trial or because they involved no defense evidence of any kind, so that the "presumption" ran only in favor of the prosecution.

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